

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
AT&T Corp.	)	RM No. 10593
	)	
Petition for Rulemaking to Reform	)	
Regulation of Incumbent Local Exchange	)	
Carrier Rates for Interstate Special	)	
Access Services	)	

**REPLY COMMENTS OF XO COMMUNICATIONS, INC.**

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XO Communications, Inc., for and on behalf of its regulated subsidiaries (collectively “XO”) provides the following reply comments in support of the AT&T Corp.(“AT&T”) Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services (“Petition”). The Commission received initial comments on AT&T’s Petition from several parties in addition to XO, and not surprisingly, the Bell operating companies (“BOCs”) uniformly oppose the petition. XO will not attempt to address all of the issues raised in the BOCs’ comments, but will focus on those that misstate the ability of facilities-based competitive local exchange carriers (“CLECs”) like XO to provide alternatives to incumbent local exchange (“ILEC”) special access services for the provision of local exchange service.

## **DISCUSSION**

The ILECs, specifically the BOCs, devote substantial portions of their comments to regurgitating arguments they have previously made in other Commission proceedings and attacking AT&T, neither of which assists the Commission in evaluating the merits of AT&T's Petition. When the ILECs address the substantive issues raised in the Petition, their focus is primarily on special access services as they relate to interexchange, rather than local, markets. Certainly the amount of special access services the ILECs provide to AT&T, MCI, and other interexchange carriers ("IXCs") dwarfs the number of such services that XO obtains, but as XO explained in its opening comments, special access circuits represent the primary – if not the only – means at XO's disposal to reach local customers. The ILECs' limited comments on the impact of their special access on local exchange competition generally contend that CLECs have alternatives to ILEC special access services and either do not use those services to provide local exchange service or are successfully using special access circuits to serve their local customers. Neither contention reflects reality.

### **1. Statistics on CLEC Network Construction Do Not Demonstrate the Existence of Alternative Sources of Special Access Services.**

The ILECs' primary substantive response to AT&T's Petition is that carriers have alternatives to ILEC special access services. The ILECs cite statistics of the number of network fiber miles that competitors have constructed, the number and nature of the buildings into which competitors have built facilities, and the public statements of other carriers about the scope of their networks. The ILECs also rely, as has the Commission, on the extent to which CLECs are collocated in ILEC wire centers as an indication of CLEC commitment to providing facilities-based alternatives to ILEC service. None of

this data demonstrates that XO and other CLECs have viable alternatives to ILEC special access services.

BellSouth's comments typify the approach taken by the BOCs. BellSouth dusts off the BOC-authored "UNE Rebuttal Report 2002" originally submitted in connection with the Commission's Triennial Review and claims "[a]s the report shows, CLECs have deployed at least 184,000 route miles of fiber, *most of which is used for local transport.*"<sup>1</sup> Even to the extent that this figure is accurate, however, fiber route miles alone provide no insight into the location of CLEC facilities or the extent to which competitors have duplicated the BOCs' (or each others') high capacity networks.<sup>2</sup> As even BellSouth implicitly acknowledges, CLEC network construction is used primarily for local *transport*, which means that CLECs must rely on BOC "last mile" or loop facilities to serve individual customer locations.

BellSouth and its "UNE Rebuttal Report," however, contradict themselves by also contending that "CLECs purchase only a small number of high-capacity loops from the BOCs, serving the vast majority of their customers with their own last-mile facilities."<sup>3</sup> Unless CLECs are serving only customers that are located a very short distance from their transport network, this statement cannot be true. It certainly is not true of XO, as BellSouth well knows. XO purchases thousands of high capacity circuits from BellSouth

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<sup>1</sup> BellSouth Comments at 14 (emphasis added).

<sup>2</sup> Fiber route miles, moreover, are calculated by multiplying the number of fibers by the total distance – for example, 10 fibers in a single sheath covering a distance of one mile would be 10 fiber route miles. The total number of fiber route miles CLECs allegedly have deployed, therefore, is not even a reliable measure of the distance covered by CLEC networks.

<sup>3</sup> *Id.* at 15.

alone in order to provide local service to XO's customers in BellSouth's service territory, and XO purchases the majority of those circuits as BellSouth special access services.<sup>4</sup>

BellSouth further contends, "By the end of 2001, one or more CLECs had obtained fiber-based collocation in BOC wire centers that contain more than half of all business lines served by the RBOCs, and in more than 60 percent of all BOC wire centers that serve over 10,000 business lines."<sup>5</sup> BellSouth presumably provides this information to show that CLECs *could* offer service to the majority of BOC business customers by accessing BOC network facilities via collocation in the serving wire center.<sup>6</sup> The data, however, underscores, rather than eliminates, the need for Commission oversight of ILEC special access services.

CLECs obtain collocation in ILEC wire centers primarily for two purposes – to provide a point at which (1) to exchange traffic and (2) to access BOC facilities, both UNEs and special access services. The number and location of CLEC collocations may arguably provide some indication of the extent to which CLECs have constructed their own transport networks,<sup>7</sup> but evidence of collocation provides no support for a finding that CLECs have duplicated the ILECs' loop facilities. To the contrary, CLEC

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<sup>4</sup> XO purchases comparable amounts of loop facilities from the other RBOCs, many of which are special access circuits. Indeed, depending on the state, nearly 100% of the thousands of DS1 and DS3 facilities that XO obtains from Qwest are special access circuits.

<sup>5</sup> *Id.* at 14-15.

<sup>6</sup> Again, this data (even if accurate) conflicts with BellSouth's representation that CLECs serve the vast majority of their customers using the CLECs' own network facilities. The data, at best, would be irrelevant if CLECs were not using collocation to access BOC loops, rather than constructing their own last-mile facilities.

<sup>7</sup> Collocation in ILEC central offices, however, does not necessarily indicate that the CLECs have constructed their own transport network. CLECs often rely on the ILEC's transport facilities – particularly DS3 special access circuits – to connect their collocation sites. Indeed, the Commission's authorization of ILEC restrictions on commingling and ratcheting special access circuits and UNEs would not be an issue but for the fact that CLECs continue to rely on ILEC special access transport, rather than CLEC-constructed, facilities.

collocation demonstrates the continuing need of facilities-based CLECs to access ILEC last mile facilities.

CLECs have obtained collocation in wire centers that serve the greatest number of potential customers so that CLECs can access the ILEC facilities necessary to provide local service to those customers. CLECs would have far less need for collocation if they were using it simply to exchange traffic.<sup>8</sup> Collocation demonstrates a commitment to facilities-based competition by the collocating CLECs but a facilities-based competition that relies on the use of ILEC loop (and often transport) facilities in conjunction with CLEC network facilities. Far from proving that carriers have constructed alternative network facilities, collocation in more densely populated areas is an indication of the reliance of facilities-based CLECs on ILEC loop facilities, both as UNEs and special access services. The BOCs' (and Commission's) use of collocation as an indication of the existence of CLEC-constructed alternatives to special access services fundamentally misconstrues the nature and purpose of collocation. Properly understood, collocation in more urban areas reflects the continuing need for regulation of ILEC last mile facilities – including special access services – not the availability of alternatives to those facilities.

## **2. ILECs' Use of Pricing Flexibility for Special Access Services Demonstrates the Lack of a Competitive Market.**

The ILECs would have the Commission believe that competition in the market for special access services is “robust” and that the regulatory flexibility that the Commission has granted ILECs has been an unqualified success. The reality is quite different. While pricing flexibility certainly has been a success for the ILECs, their use of that flexibility

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<sup>8</sup> Wireless carriers, for example, have exchanged large volumes of traffic with ILECs for years without obtaining any collocation.

has demonstrated the lack of a competitive market, and CLECs and the development of effective local exchange competition have suffered accordingly.

XO's experience with Qwest provides a prime example of the results of the Commission's pricing flexibility. The Commission granted Qwest pricing flexibility for special access services in zone 1 in Utah and several other Qwest states in Spring 2002. Less than six months later, Qwest notified XO and other special access customers that Qwest was raising its rates by 15% effective November 1, 2002. During that same six month period, Qwest filed its application with the Commission for authority to provide interLATA services originating in Utah and eight other states and, as part of which, "voluntarily" reduced its high capacity loop rates. Qwest, for example, now charges \$65.80 for a DS1 loop in urban areas in Utah – less than half the \$135.00 special access rate for a comparable circuit. XO purchases thousands of DS1 circuits from Qwest in Utah, and virtually all of them are special access services. XO accordingly faces hundreds of thousands of dollars in additional annual costs to serve its existing local customers, as well as significantly higher costs to serve future customers.

The ILECs dismiss concerns over such price increases and high margins over total element long-run incremental cost ("TELRIC") as the allegedly natural workings of a competitive market and the shortcomings of the Commission's TELRIC methodology. The more plausible explanation is that insufficient competition exists in the market to discipline the ILECs' special access prices in the absence of rate regulation. No rational carrier would pay twice as much or more for a special access circuit as it would pay for the same circuit as a UNE unless the carrier has no alternative. As XO explained in its opening comments, XO purchases special access circuits from the ILECs because it

cannot purchase those same facilities as UNEs. Restrictions on commingling and ratcheting, along with ILECs' refusal to build UNEs while agreeing to build the same circuits as special access services, effectively undermines the practical or economic viability of UNEs in a number of instances, leaving XO with no alternative to ILEC special access services.

BellSouth, more specifically, contends that its rate "adjustments" were necessary to reflect unspecified and unquantified "transaction costs," and that "substantial discounts off month-to-month rates remain available for DS1 and DS3 services through term plans" and special contracts.<sup>9</sup> With rates that already exceeded TELRIC by over 100%, BellSouth strains credulity by claiming that additional increases were necessary to recover additional "transaction costs." The availability of discount plans, moreover, does not address the fundamental issue. Qwest's special access tariff continues to offer up to a 20% discount off of its month-to-month rates in exchange for term and volume commitments, but even the maximum discounted rates are only slightly less than the full retail rates Qwest charged prior to its 15% rate increase. A rate increase is a rate increase, and ILECs are increasing their special access rates after receiving pricing flexibility because they can – their customers simply have no alternative and must pay whatever rate the ILEC chooses to charge. The added insult to this injury is that the CLEC must commit to a five year term and to purchasing even more special access services during that same time period for the privilege of paying what were almost full month-to-month tariff rates prior to the rate increase.

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<sup>9</sup> BellSouth Comments at 11.



BellSouth and the BOCs also claim that negotiation, rather than regulation, has been more successful in improving special access service rates, terms, and conditions.<sup>10</sup> The ILECs, however, have their own unique view of what constitutes “negotiation” (and “improvement”). The BOCs tellingly provide no details of the rates and service quality standards that they have “negotiated” with their special access service customers. The offers with which XO is familiar, however, involve volume and term discounts or paying higher rates in exchange for better service quality. Offering volume and term discounts to captive customers to forestall development of competitive alternatives is neither an improvement nor negotiation. Similarly, providing poor service quality unless a CLEC agrees to pay higher rates is anything but the hallmark of legitimate negotiations in a competitive environment. The Commission should not be surprised that so many of SBC’s and BellSouth’s special access customers have accepted these Hobson’s choices, but the Commission should not interpret such “improvements” or “negotiations” as anything other than carrier customer attempts to make the best of a bad situation.

Again, XO has had first hand experience with BOC “negotiations.” BellSouth, for example, recently refused XO’s request to use the same process and rates available for converting special access services to loops as BellSouth uses to convert special access services to loop-transport combinations. Instead, BellSouth insisted that the only way XO could convert special access services to loops would be to disconnect the special access circuit and reorder the circuit as a UNE, which not only would require XO to pay nonrecurring installation charges twice on the same circuit, but also would threaten to disrupt service to XO’s customers. Moreover, BellSouth refused to coordinate these

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<sup>10</sup> BellSouth Comments at 11-12; SBC Comments at 24-25.

disconnections and reconnections of active circuits unless XO agreed to a “market-based” price for project management of each circuit. BellSouth flatly refused to negotiate a conversion process or rates similar to those offered for special access to loop-transport combinations, but instead offered to “negotiate” the market-based price for project management. Following months of discussions, BellSouth ultimately refused to negotiate a conversion process or even a reasonable rate for project management: BellSouth’s proposed rates were approximately \$1,500 per circuit, compared to the roughly \$50 per circuit that BellSouth charges to convert a special access circuit to a loop-transport combination. Such “my way or the highway” negotiations are consistent only with provisioning of monopoly services and are far more typical of the “negotiations” the BOCs offer to undertake with its special access customers.

Finally, the ILECs question any need for Commission action when, in the ILECs’ view, CLECs are successfully serving local, as well as long distance, customers using ILEC special access services. Indeed, Verizon goes so far as to imply that because of this success, high capacity UNEs are unnecessary.<sup>11</sup> What success CLECs have had, however, has come in spite of the ILECs’ attempts to avoid providing high capacity UNEs and the rates, terms, and conditions that they have imposed on special access services. A CLEC, like any other provider, must recover its costs to provide service through the rates it charges for that service. Consumers thus ultimately pay the special access rates the ILECs charge, and many small and medium sized businesses cannot afford to pay CLEC rates that are set to recover ILEC special access pricing. The ILECs may consider the minimal level of market share that CLECs have been able to achieve a

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<sup>11</sup> See Verizon Comments at 18-19.

success when ILECs continue to dominate the local exchange market, but the Commission should not.

### **CONCLUSION**

Pricing flexibility of special access services threatens to limit the development of effective, facilities-based, local exchange competition to the medium and large business customers who can afford to pay rates based on the inflated prices CLECs must pay for ILEC special access services. Accordingly, for the reasons discussed above, as well as in XO's opening comments and AT&T's Petition, the Commission should grant the Petition.

Respectfully submitted,

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